No. 16-1495

IN THE

Supreme Court of the United States

CITY OF HAYS, KANSAS,

Petitioner,

v.

MATTHEW JACK DWIGHT VOGT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself."

The question presented is:

Whether the prosecution's use of a defendant's compelled testimonial statement at an in-court, adversarial probable cause hearing, held after the defendant has been criminally charged and for the purpose of demonstrating the prosecution has sufficient evidence of the defendant's guilt to seek his conviction and punishment, violates the Fifth Amendment.

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INTRODUCTION

As Petitioner observes, this case presents "a straightforward question of law," Pet. Br. 9: Did the use of Respondent Matthew Vogt's compelled testimonial statement at an in-court, adversarial probable cause hearing, held after he had been criminally charged and for the purpose of demonstrating the prosecution had sufficient evidence of his guilt to seek his conviction and punishment, violate the Fifth Amendment?

Whatever ambiguities the Fifth Amendment allows, the answer to that question is not among them. The Self-Incrimination Clause prohibits the government from "compel[ling]" a person "to be a witness against himself" "in any criminal case." U.S. Const. amend. V. There is no dispute before this Court that Officer Vogt's statements were compelled by Petitioner and implicated him in criminal conduct. *See* Pet. Br. 3, 26. And there is no dispute that those statements were testimonial and admitted in an adversarial courtroom proceeding as evidence he was guilty of the charged crimes. Pet. Br. 4. This scenario checks all of the Clause's boxes: Officer Vogt was "compelled" to make a testimonial statement about his participation in the charged offense—i.e., he acted as a "witness"—and his compelled statement was then used "against hi[m]" in a "criminal case."

Remarkably, Petitioner now abandons the supposed ambiguity at the crux of the parties' dispute thus far: Whether the term "criminal case" refers only to criminal trials, or also includes the probable cause

hearing at issue here. This concession is to Petitioner's credit. The Tenth Circuit was plainly correct that the text, history, and purpose of the Fifth Amendment, as well as the precedent of this Court, establish that the probable cause hearing against Office Vogt was part of his "criminal case." Pet. App. 5a-19a.

Petitioner instead argues that even if the probable cause hearing was part of the criminal case against Officer Vogt, the phrase "witness against himself" limits the Fifth Amendment's protection to criminal trials. But Petitioner does not and cannot contest that Officer Vogt's statements were testimonial—i.e., they "relate[d] [to] either express or implied assertions of fact or belief"—which is precisely what makes someone a "witness" under this Court's precedent. *See, e.g., United States v. Hubbell*, 530 U.S. 27, 35 (2000); *Davis v. Washington*, 547 U.S. 813, 830 (2006). Nor does Petitioner contest that the statements were used at the probable cause hearing *as evidence of Officer Vogt's criminal guilt* and for the specific purpose of pursuing his criminal conviction and punishment. This incriminating use rendered Officer Vogt a "witness against himself" under any plausible definition of the term.

The purpose and history of the Fifth Amendment confirms that the Framers intended the Self-Incrimination Clause to apply according to its plain meaning. Petitioner makes much of the notion that the Fifth Amendment does not protect against "embarrassment, personal disgrace or opprobrium," Pet. Br. 16 (quoting *Brown v. Walker*, 161 U.S. 591, 605 (1896))

(internal quotation marks omitted). But the prosecution did not present Officer Vogt's statements as evidence at the probable cause hearing in order to embarrass him; the point was to persuade the judge that the prosecution had sufficient evidence of Officer Vogt's guilt to continue with the prosecution and ultimately convict and punish him. This Court has long recognized that such "enlist[ment] [of] the defendant as an instrument in his ... own condemnation" is antithetical to the Fifth Amendment. *Mitchell v. United States*, 526 U.S. 314, 325 (1999).

Unable to find any meaningful support for its "witness against himself" theory, Petitioner resorts to snippets of dicta describing the Fifth Amendment as a "trial right," Pet. Br. 9-15, all from cases in which the Court had no reason to consider the use of compelled testimony in criminal proceedings apart from the trial itself. That those cases use the term "trial right" only as imprecise shorthand is evident from the numerous cases in which the Court has directly confronted the scope of the Self-Incrimination Clause and held that it is *not* limited to trial proceedings. *See, e.g.*, *Mitchell*, 526 U.S. at 327; *Estelle v. Smith*, 451 U.S. 454, 462-63 (1981); *Kastigar v. United States*, 406 U.S. 441, 449 (1972).

Ultimately, Petitioner is left to argue that the Court should limit the Self-Incrimination Clause to criminal trials in the name of public policy. But the rule adopted by the Tenth Circuit and several other courts of appeals is easily administrable and appropriately balances the interests of the prosecution and the accused. Preserving the status quo would in any

event furnish no reason to diminish an essential constitutional protection.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment states in relevant part that "No person ... shall be compelled in any criminal case to be a witness against himself."

STATEMENT OF THE CASE

Petitioner Compels Officer Vogt To Make Incriminating Statements As A Condition Of His Employment[1]

Respondent Matthew Vogt was employed as a police officer for Petitioner City of Hays. In late 2013, he applied for a job with the police department of a separate municipality in Kansas: the City of Haysville. Pet. App. 2a, 48a. During that hiring process, Officer Vogt disclosed that he had kept a knife he obtained while working as a Hays police officer. *Id.* Haysville offered Officer Vogt a job, conditioned upon his reporting his possession of the knife and returning it to the Hays police department. Pet. App. 2a-3a, 48a-49a.

Officer Vogt then reported and returned the knife to the Hays police department. Pet. App. 2a-3a, 49a. The Hays police chief responded by opening an internal investigation to determine whether Officer Vogt had violated the department's administrative policies. Pet. App. 49a. As part of that inquiry, the police

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[1] Officer Vogt's factual recitation relies on his complaint, as is required where, as here, the proceedings are at the pleading stage.

chief ordered Officer Vogt to document the facts concerning his possession of the knife, and explained that his compliance was a condition of keeping his job with the Hays police department. Pet. App. 3a, 49a. Officer Vogt followed the order and provided a one-sentence report about the knife. *Id.* He then gave the Hays police department two weeks' notice, intending to accept the new job in Haysville. *Id.*

The police officer in charge of the Hays investigation subsequently required Officer Vogt to provide a more detailed statement. He again complied and this time provided additional information about his possession of the knife. Pet. App. 3a, 49a-50a.[2] The Hays police department used the details from Officer Vogt's second statement to locate additional evidence, including an audio recording describing how Officer Vogt acquired the knife. *Id.*

Petitioner Initiates A Criminal Investigation That Results In Criminal Charges Against Officer Vogt And The Use Of His Statements As Evidence Of His Guilt At His Probable Cause Hearing

Based on Officer Vogt's statements and the additional evidence obtained through the police department's inquiry, the Hays police chief asked the Kansas Bureau of Investigation to start a criminal in-

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[2] This Court should disregard the government's account of the substance of Mr. Vogt's statements, *see* U.S. Br. 2, which relies on a factual representation made by Petitioner's trial counsel that is concededly "outside the pleadings." C.A. App. 60 n.1.

vestigation. Pet. App. 3a, 50a. The Hays police department provided the Bureau with all the evidence it had obtained from its internal investigation, including Officer Vogt's compelled statements and the audio recording. *Id.* As a result of the criminal investigation, the Haysville police department withdrew Officer Vogt's job offer. *Id.*

In early 2014, Officer Vogt was charged with two felony counts related to his possession of the knife, and criminal proceedings commenced in Ellis County, Kansas district court. *Id.* Later that year, the district court conducted a probable cause hearing. At that hearing, the prosecution was required to establish "probable cause to believe that a felony ha[d] been committed" by Officer Vogt. Kan. Stat. § 22-2902(3). If the prosecution failed to meet that burden, Officer Vogt had to be "discharge[d]." *Id.* Officer Vogt was entitled to be present at the hearing, to cross-examine witnesses, and to present "evidence in [his] own behalf." *Id.*

Officer Vogt's compelled statements and the evidence obtained as a result of those statements were admitted at the hearing as evidence of his guilt. Pet. App. 20a, 50a. A state magistrate judge and district court judge subsequently ruled that probable cause was lacking. Pet. App. 3a, 50a-51a. Accordingly, in early 2015, the criminal charges against Officer Vogt were dismissed.

The District Court Holds That Use Of Officer Vogt's Compelled Statements At The Probable Cause Hearing Did Not Violate The Fifth Amendment, And The Court Of Appeals Reverses And Remands

Following the dismissal of the criminal charges, Officer Vogt filed this action in Kansas federal district court under 42 U.S.C. § 1983. His suit named as defendants Petitioner, the City of Haysville, and certain Hays and Haysville officials in their individual and official capacities. Officer Vogt's complaint alleged, among other things, that the use of his compelled statements in the criminal case against him violated his Fifth Amendment rights. Pet. App. 1a, 3a-4a, 46a-54a.

The defendants, including Petitioner, moved to dismiss for failure to state a claim. The district court granted the dismissal motions, holding that Officer Vogt failed to plead a Fifth Amendment violation. Pet. App. 35a-44a. The district court found it dispositive that Officer Vogt's compelled statements "were never introduced against [him] at trial," even though "the compelled statements were allegedly used in obtaining the criminal charges and in the probable cause hearing." Pet. App. 43a.

On appeal, the Tenth Circuit affirmed dismissal of Haysville on the ground that it did not compel Officer Vogt's statements, and it affirmed dismissal of the individual officers based on qualified immunity. Pet. App. 20a. With respect to Petitioner, the Court of Appeals held that Officer Vogt had stated a plausible

claim for relief, and thus remanded for further proceedings. Pet. App. 2a, 33a.

In concluding that Officer Vogt stated a claim against Petitioner, the Tenth Circuit reversed the district court's holding that the Fifth Amendment is not violated unless the compelled statements are used at a trial. The Court of Appeals relied on the text of the Self-Incrimination Clause, which provides that "No person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. After considering the term "criminal case" on its face and drawing a textual comparison with neighboring amendments, the Tenth Circuit determined that the term covers proceedings beyond the trial itself, including the probable cause hearing against Officer Vogt. Pet. App. 10a-11a. It also undertook a detailed examination of the Clause's original meaning, which it found to be consistent with the provision's text. Pet. App. 11a-19a.

The Court of Appeals then concluded that because Officer Vogt sufficiently "alleged that his compelled statements had been used in a probable cause hearing," he adequately "pleaded a Fifth Amendment violation consisting of the use of his statements in a criminal case." Pet. App. 20a.

SUMMARY OF THE ARGUMENT

I. The Self-Incrimination Clause provides that "no person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Clause's text, purpose, and history, along with

this Court's decisions applying it, confirm that a Fifth Amendment violation occurred here.

A. The Self-Incrimination Clause extends its protections to "any criminal case." Petitioner does not dispute that "criminal case" includes the probable cause hearing here, which was an adversarial proceeding before a judge that took place after Officer Vogt was criminally charged and was held for the purpose of assessing the evidence of his guilt. Petitioner now argues instead that the phrase "witness against himself" limits the Clause's protection to criminal trials, but that phrase simply describes the type of evidence covered by the Clause—namely, evidence that is testimonial and incriminating in character. The phrase "in a criminal case," by contrast, describes the setting in which the proscription applies. A defendant is just as much a "witness against himself" when his compelled, incriminating, and testimonial statement is admitted as evidence of his guilt at an in-court probable cause hearing as he would be if it were admitted at a subsequent trial.

B. The courtroom use of Officer Vogt's compelled testimony at the probable cause hearing to demonstrate his criminal guilt is directly contrary to the purpose of the Fifth Amendment, which is designed to prevent incriminating uses of statements throughout a criminal case, not just in the proceedings that ultimately determine guilt and punishment. Neither Petitioner (nor the government as amicus) offers any serious argument that the particular use of compelled, incriminating testimony that took place here—in an in-court, adversarial probable cause hearing for the purpose of assessing the evidence of

the defendant's guilt and without which there can be no criminal conviction—is so divorced from the ultimate determination of guilt and punishment that it might fall outside of the Clause's protections.

Historical practice confirms the Framers intended the protections of the Fifth Amendment to apply to pretrial proceedings like Officer Vogt's probable cause hearing. At common law, the prosecution could not compel incriminating testimony from a defendant before or during the criminal case (pretrial and at trial). The privilege thus guaranteed that compelled testimony could not be used at any point in the criminal case. In arguing otherwise, the government identifies nothing in the historical record suggesting that the Framers intended to limit the prohibitions on the use of compelled testimony to trials only.

C. This Court's precedents confirm that the Self-Incrimination Clause applies to the probable cause hearing here. None of the cases relied on by Petitioner called upon the Court to consider the use of compelled testimony during criminal proceedings apart from a trial itself. Any reference to "trial" was simply imprecise shorthand reflecting the distinction between rights that can be violated outside of the criminal process (e.g., the Fourth Amendment) and Fifth Amendment violations, which must be linked to a "criminal case."

Moreover, the Court's determination that the Self-Incrimination Clause's protections apply to sentencing proceedings forecloses Petitioner's literal reading of the "trial right" dicta it relies on so heavily. And the Court's witness immunity cases confirm that

pretrial uses of compelled testimony may indeed violate the Fifth Amendment. These cases—and the broad protections they articulate against any use by the prosecution that may "lead" to criminal penalties—do not condition Fifth Amendment violations on use in a proceeding that ultimately assesses guilt or punishment.

D. Petitioner's arguments about grand jury proceedings are a distraction. The Court need not consider the Self-Incrimination Clause's application in grand jury proceedings to affirm the decision below. Even accepting the premise that facially valid indictments generally cannot be challenged as founded on compelled testimony, *see* Pet. Br. 19, that would at most shield pre-*indictment* uses of compelled statements from Fifth Amendment scrutiny. Here, however, the use took place after charges were filed, and in an adversarial courtroom proceeding.

II. Petitioner's and the government's policy concerns are largely irrelevant and at best overstated.

A. Applying the Fifth Amendment to proceedings like Officer Vogt's probable cause hearing would have no adverse impact on the government's interest in rooting out employee misconduct. To the contrary, entities like Petitioner are free to compel incriminating information from their employees so long as they do not then cause those statements to be used in a criminal case. Law enforcement agencies around the country have developed effective means of accommodating both law enforcement interests and the Fifth Amendment interests of government employees. In light of

these established procedures and the well-settled expectations underlying immunity doctrines, Petitioner's rule would only hinder state and federal investigatory efforts because the threat of criminal prosecution—even short of trial—would undermine government employees' incentive to cooperate. In any event, even if the Fifth Amendment imposed additional burdens on law enforcement, the need to safeguard individuals from compelled self-incrimination would transcend that interest.

B. Both Petitioner and the government speculate that this Court's affirmance of the Tenth Circuit's holding will create difficulties for the courts (and prosecutors) because they will have to find new ways, earlier in the case, to adjudicate questions about whether a statement is protected by the Fifth Amendment. They identify no evidence, however, that pretrial proceedings have become unworkable in the circuits with the same rule as the Tenth Circuit. And if some jurisdictions' procedures would need adjustment to accommodate the Fifth Amendment's proper scope, that consequence would be unremarkable in light of this Court's precedent requiring state and federal courts to adopt additional procedures when the Constitution so requires.

C. The other constitutional protections identified by Petitioner are not adequate alternatives for safeguarding defendants. Protection from the use of compelled statements at trial is insufficient given the probable cause hearing's crucial role in affording the defendant a chance to avoid trial in the first place. Indeed, for many defendants, the probable cause hearing will be the only significant in-court criminal

proceeding—and the only chance to prevail in a criminal case—as the vast majority of criminal cases end in pleas. Petitioner's rule will embolden prosecutors to bring questionable cases, and defendants will be unable to effectively test the case against them at the probable cause hearing. Petitioner's discussion of protections under the Fourth, Eighth, and Fourteenth Amendments misses the point. Officer Vogt has sufficiently alleged a violation of the Fifth Amendment based on the use of compelled statements, not their manner of extraction.

ARGUMENT

I. The Text, Purpose, And History Of The Self-Incrimination Clause Foreclose Petitioner's Effort To Exclude The Probable Cause Hearing Against Officer Vogt From Fifth Amendment Protection.

The Self-Incrimination Clause applies unambiguously to this case. The Clause prohibits the government from "compel[ling]" a person "to be a witness against himself" "in any criminal case." U.S. Const. amend. V. There is no dispute before this Court that Officer Vogt's statements were compelled, testimonial, and implicated him in a crime *See* Pet. Br. 3, 26. There also is no dispute that after Officer Vogt was criminally charged, those statements were admitted in an in-court, adversarial probable cause hearing as evidence that he was guilty of the charged crimes. Pet.

Br. 3-4.[3] And as of the filing of Petitioner's merits brief, there is no longer even a dispute that the term "criminal case" covers the probable cause hearing in which Officer Vogt's statements were used against him.

Instead, Petitioner's lone theory is that the phrase "witness against himself" limits the Self-Incrimination Clause's protections to "trials," thereby excluding probable cause hearings. The government advances a variant of this argument, contending that the right is violated only when statements are used to "adjudicate guilt or punishment," U.S. Br. 11, which, according to the government, does not include a court's assessment of the evidence of guilt at a probable cause hearing.

These proposed limitations on the Self-Incrimination Clause have no basis in its text, purpose, or history, or in this Court's decisions applying it. To the contrary, every indication confirms that a Fifth Amendment violation occurs where, as here, a compelled statement is used against a defendant in his "criminal case" for the purpose of showing the defendant committed the charged offense.

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[3] The Tenth Circuit rejected defendants' contention that Officer Vogt was not entitled at the motion-to-dismiss stage to an inference that his alleged compelled statements were "admitted into evidence through witness testimony." Pet. App. 20a & n.17 (internal quotation marks omitted). That holding is not before this Court. Pet. Br. 9.

A. Petitioner identifies no plausible textual basis for excluding the probable cause hearing here from Fifth Amendment protection.

1. Conspicuously absent from both Petitioner's brief and the government's brief is any serious engagement with the Fifth Amendment's text. If the Framers had intended to confine the Self-Incrimination Clause to trials, they easily could have drafted it as such: For example, "[n]o person ... shall be compelled in any criminal *trial* to be a witness against himself," or "[n]o person ... shall be compelled, in any criminal *proceeding where guilt and punishment are determined,* to be a witness against himself."

Instead, the Framers chose to extend the Self-Incrimination Clause's protections to "any criminal *case*." The meaning of "criminal case"—and in particular whether that term includes a probable cause hearing held after a defendant has been charged with a crime—has thus been at the crux of the parties' dispute until now. That is where the district court and Tenth Circuit focused their inquiries in the proceedings below. Pet. App. 4a, 39a. That is the issue that Petitioner, at the certiorari stage, understood to underlie its Question Presented. *E.g.*, Pet. 4 (endorsing the Tenth Circuit's identification of a "circuit split [that has] developed," following *Chavez v. Martinez*, 538 U.S. 760 (2003), "over the definition of a 'criminal case' under the Fifth Amendment"). And that is where a majority of this Court looked when presented with a related question in *Chavez*. *See* 538 U.S. at 766-67 (plurality opinion); *id.* at 777 (opinion of Souter, J., concurring in the judgment).

This framing of the question, however, creates an obvious problem for Petitioner. Although the Court has not yet decided the "precise moment when a 'criminal case' commences," *Chavez*, 538 U.S. at 767 (plurality opinion), there is no conceivable textual or doctrinal reason to read the term "criminal case" as excluding probable cause hearings like the one here: an adversarial courtroom proceeding that takes place after charges are filed and for the sole purpose of assessing the evidence of the defendant's guilt.

According to Framing-era sources, "case" meant "[a] cause or suit in court" and was "nearly synonymous with cause." 1 Noah Webster, *An American Dictionary of the English Language* (1828). "Cause," in turn, was simply "a suit or action in court; any legal process which a party institutes to obtain his demand." *Id.* Contemporary dictionaries define "case" in much the same way. *See, e.g.*, Black's Law Dictionary 258 (10th ed. 2014) ("A civil or criminal proceeding, action, suit, or controversy at law or in equity."). And when called upon to define "case" in analogous contexts—for example, interpreting the "case" requirement of Article III—this Court has defined case to mean "a proceeding in court, a suit, or action." *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 595 (1871).

The Tenth Circuit thus was plainly correct to conclude that a "criminal case" encompasses the probable cause hearing here. Officer Vogt was "charged" "with two felony counts related to his possession of the knife." Pet. App. 50a. Those charges initiated formal adversarial legal proceedings against him. Kan. Stat. § 22-2202(g) (definition of "charge"); *see also id.*

§ 22-2301 ("[A] prosecution shall be commenced by filing a complaint with a magistrate."). As a consequence, the Kansas district court opened a case against Officer Vogt (docket number 14CR-285), Pet. App. 50a, and Officer Vogt became entitled to a probable cause hearing. Kan. Stat. § 22-2902(1) ("[T]he state and every person *charged* with a felony shall have a right to a preliminary examination." (emphasis added)). By the time the hearing occurred, Officer Vogt's criminal case was well under way.[4]

The Tenth Circuit's interpretation of "criminal case" is also compelled by precedent. This Court has long recognized that the term covers at least the same proceedings as does the term "criminal prosecution" in the Sixth Amendment. *See Counselman v. Hitchcock*, 142 U.S. 547, 562-63 (1892), *overruled on other grounds by Kastigar v. United States*, 406 U.S. 441 (1972); *see also Rothgery v. Gillespie Cty.*, 554 U.S. 191, 222 (2008) (Thomas, J., dissenting) (citing *Counselman* for the proposition that "a 'criminal case' under the Fifth Amendment is much broader than a 'criminal prosecution' under the Sixth Amendment").

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[4] The critical role Officer Vogt's probable cause hearing played in the criminal process confirms that the proceeding was a central part of his criminal case. Absent a plea, a decision to proceed by grand jury indictment, or waiver of the hearing by the defendant, every felony conviction in Kansas depends on the prosecution meeting its burden at a probable cause hearing. Kan. Stat. § 22-2902(1), (3). If the prosecution does not establish probable cause, the defendant's case must be dismissed. *Id.* § 22-2902(3). As this Court observed, a probable cause hearing is "often the final and most important step in the criminal proceeding." *Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1, 12 (1986).

A "criminal prosecution" commences no later than upon "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, *preliminary hearing*, indictment, information, or arraignment." *Rothgery*, 554 U.S. at 198 (majority opinion) (emphasis added) (quoting *United States v. Gouveia*, 467 U.S. 180, 188 (1984)). If, as *Rothgery* holds, a "criminal prosecution" covers a preliminary hearing like the one here, then the same must be true of a "criminal case" under the Fifth Amendment.

2. Remarkably, Petitioner no longer argues to the contrary. Petitioner's merits brief wholly abandons Petitioner's prior position that Officer Vogt's probable cause hearing falls outside the scope of a Fifth Amendment "criminal case." Pet. Br. 5, 9. The government also declines to take issue with the Tenth Circuit's conclusion on this front. U.S. Br. 9-10.

Instead, they argue that even if the probable cause hearing was part of the criminal case against Officer Vogt, it falls outside the Clause's protections because the phrase "witness against himself" limits the proceedings protected by the Self-Incrimination Clause to criminal trials, Pet. Br. 5, 9, or other "proceedings [that] expose a defendant to the risk of conviction or punishment." U.S. Br. 11.

This change in strategy, however, just replaces Petitioner's first insurmountable textual problem with a second: Whatever constraints the phrase "witness against himself" may impose on the Clause's application, it provides no basis for excluding the circumstances here, where the compelled statements were used in an adversarial courtroom proceeding as

evidence that the defendant was guilty of the charged crime.

This Court has explained that a defendant becomes a "witness against himself" when he makes "incriminating communications ... that are 'testimonial' in character." *United States v. Hubbell*, 530 U.S. 27, 34 (2000); *see also id.* at 49-50 (Thomas, J., concurring) ("The Court's opinion ... essentially defines 'witness' as a person who provides testimony, and thus restricts the Fifth Amendment's ban to only those communications 'that are testimonial in character.'"); *Garrity v. New Jersey*, 385 U.S. 493, 495, 500 (1967) (finding Fifth Amendment violation where police officers' compelled and incriminating out-of-court statements made during an official investigation "were used in subsequent prosecutions"); *accord Ohio v. Clark*, 135 S. Ct. 2173, 2179 (2015) ("'witnesses,' under the Confrontation Clause, are those 'who bear testimony'").

The phrase "witness against himself" thus limits the Self-Incrimination Clause's protections in two ways: The word "witness" requires the statements to be testimonial, i.e., to "relate[] either express or implied assertions of fact or belief." *Hubbell*, 530 U.S. at 35 (citing *Pennsylvania v. Muniz*, 496 U.S. 582, 594-98 (1990)); *see also Hiibel v. Sixth Judicial Dist. Ct. of Nev.*, 542 U.S. 177, 189 (2004) ("[T]o be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." (alteration in original) (quoting *Doe v. United States*, 487 U.S. 201, 210 (1988))). And

"against himself" requires that the testimonial statement be "incriminating." *Hubbell*, 530 U.S. at 34; *see also Hiibel*, 542 U.S. at 189.

This understanding is consistent with the historical definition of witness: someone who "bears testimony" by providing a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (quoting 2 Noah Webster, *An American Dictionary of the English Language* (1828)). Under this standard, a person is not a "witness against himself," for example, when he is forced "to put on a shirt, to provide a blood sample or handwriting exemplar, or to make a recording of his voice." *Hubbell*, 530 U.S. at 35 (footnotes omitted). But where, as here, a defendant makes a statement about possible criminal conduct to government officials during an investigation, it is plainly testimonial.

As these examples demonstrate, whether someone acts as a "witness against himself" turns on the nature of the evidence given and circumstances surrounding that person's statement at the time it is made, not how or when the prosecution later uses that statement. *See Davis v. Washington*, 547 U.S. 813, 830 (2006) (a statement is testimonial when made in "response to police questioning" about how "potentially criminal past events began and progressed."). In other words, the phrase "witness against himself" describes the type of evidence that cannot be used under the Self-Incrimination Clause, while the phrase "in a criminal case" describes the setting in which the proscription applies.

As further evidence that "witness against himself" does not limit the Self-Incrimination Clause to criminal trials, this Court has described individuals as witnesses in a variety of *pretrial* contexts, including when their testimony comes in the "grand jury room," *United States v. Washington*, 431 U.S. 181, 187-88 (1977), as part of "any investigation," *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (citation omitted), or in response to a pretrial subpoena, *see Hubbell*, 530 U.S. at 36. The Court has specifically used the word "witness" when describing the role of a person giving evidence at preliminary hearings like the one at issue here. *See Gerstein v. Pugh*, 420 U.S. 103, 122-23 (1975). Some of these examples may even be *outside* of the "criminal case," but the individuals were nonetheless witnesses; what made the person a "witness" was that he was providing incriminating testimony, regardless whether that testimony would be used at trial.

Petitioner's proposed interpretation not only defies this Court's precedent, it is also contrary to common sense. All agree that a defendant is a "witness against himself" if the defendant's testimonial statement is used by the prosecution at trial as evidence of his guilt.[5] But neither Petitioner nor the government

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[5] Petitioner and the government both correctly decline to argue the word "witness" refers only to a defendant physically taking the stand at trial. *See* Pet. Br. 6 (acknowledging that a defendant is a "witness" for purposes of the Self-Incrimination Clause when his "own compelled statements are introduced against [him] at trial," even if the defendant is not "forced to take the witness stand"); U.S. Br. 6, 15 (focusing solely on the character of proceedings in which a witness's "statements are used").

offers any explanation for why a defendant would be any less a "witness against himself" if his compelled incriminating statement is used by the prosecution in court as evidence of his guilt at a probable cause hearing. A person providing self-incriminating testimony at a probable cause hearing—or whose prior factual admissions are used at that hearing—has had evidence used against him that is just as testimonial as a compelled statement made at or for use at trial.

Petitioner's proposed definition of "witness against himself" also contradicts what the Framers understood the term to mean, as reflected by criminal procedure at the time. Under common law, a defendant was barred from being a "witness" at his own trial, *see Ferguson v. Georgia*, 365 U.S. 570, 574 (1961); Pet. App. 17a, so the Framers could not possibly have intended the phrase to cover statements made by the defendant only at the trial itself.

As discussed in more detail below, *infra* at 31-32, the most common Framing-era proceeding at which a defendant was required to provide incriminating factual material that could be used against him—that is, to be a "witness against himself"—was not trial but a

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As this Court has explained in the Sixth Amendment context, "one could plausibly read 'witnesses against' a defendant to mean those who actually testify at trial ... *those whose statements are offered at trial*, ... or something in-between." *Crawford*, 541 U.S. at 42-43 (emphasis added). Because the Self-Incrimination Clause covers more than the Confrontation Clause, it must also protect the introduction of statements at trial. *See* U.S. Br. n.14.

pretrial proceeding authorized by English statutory law (the Marian Committal Statute of 1555) and imported into American practice. At that pretrial proceeding, a justice of the peace was authorized to interrogate accused felons and any accusing witnesses in order to gather incriminating evidence against the accused. Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 Mich. L. Rev. 1086, 1095-98 (1994); Albert W. Alschuler, *A Peculiar Privilege In Historical Perspective: The Right to Remain Silent*, 94 Mich. L. Rev. 2625, 2654-59 (1996). In this way, the defendant was asked to be a witness against himself (even if common law principles, which prevented the uses of oaths and other compulsion, prevented him from being *compelled* to be such a witness). Alschuler, *supra*, at 2657-59; John H. Langbein, *The Historical Origins of the Privilege Against Self Incrimination At Common Law*, 92 Mich. L. Rev. 1047, 1061 (1994).

Moreover, the Framers specifically referred to those examined in that pretrial proceeding as witnesses. Framing-era treatises and manuals used the term "witness" to describe someone who provided testimony against the accused during the pretrial committal procedure. *The Conductor Generalis* 176-178 (J. Parker ed. 1788) (referring to those providing evidence against a defendant in pretrial proceeding as "witnesses"); 1 Matthew Hale, *The History of the Pleas of the Crown* 586 (1800); 1 Richard Burn, *The Justice of the Peace and Parish Officer* 315-16 (1756); *see also United States v. Gecas*, 120 F.3d 1419, 1444 (11th Cir. 1997) (justice of the peace "manuals of the time" provided that "judges should not question suspects under

oath at the preliminary examination" but permitted them "to interrogate *witnesses* under oath." (emphasis added)).

3. To the extent Petitioner and the government offer any textual explanation for their proposed limitations on the Fifth Amendment, it is only that the Sixth Amendment also uses the word "witness," and this Court has indicated that the rights protected by that Amendment do not necessarily extend to grand jury and other pretrial proceedings. *See* Pet. Br. 22; U.S. Br. 14-16.

But this Court has never suggested the Sixth Amendment is trial-oriented because it uses the word "witness." Rather, that trial focus reflects the fact that the Sixth Amendment extends only to "criminal prosecutions," and, depending on the right at issue, only parts of that "criminal prosecution." *See, e.g.*, *United States v. Williams*, 504 U.S. 36, 49 (1992) (referring to "the grand jury proceeding's status as other than a constituent element of a 'criminal prosecutio[n]'"); *Gerstein*, 420 U.S. at 122 (holding that the preliminary determination of probable cause to extend pretrial detention is "not a 'critical stage' in the prosecution" for Sixth Amendment purposes); *cf. Barber v. Page*, 390 U.S. 719, 725 (1968) (cross-examination at a preliminary hearing does not substitute for cross-examination at trial due to the particular need "for the jury to weigh the demeanor of the witness"). As noted earlier, *supra* at 17-18, this Court has long recognized that the Framers' use of the term "criminal prosecution" in the Sixth Amendment as compared to "criminal case" in the Fifth Amendment is why the former is "much narrower" than the latter.

Counselman, 142 U.S. at 563 (grand jury proceedings are part of a "criminal case" under the Fifth Amendment but not a "criminal prosecution" under the Sixth Amendment); *see also Rothgery*, 554 U.S. at 222 (Thomas, J., dissenting).

The government's reliance on *Cruz v. New York*, 481 U.S. 186, 190 (1987), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313 (2009), U.S. Br. 15, fails for the same reason. These cases discuss what it means to be a witness "against" a defendant for purposes of the Confrontation Clause. But these cases demonstrate that the word "against" simply requires that the witness's testimonial statement be incriminating. It does not follow that testimonial statements can be used "against" a defendant only at trial, as opposed to other parts of a criminal case. As the *Chavez* plurality recognized in the Fifth Amendment context, a person is compelled to be a "witness against himself" in violation of the Fifth Amendment so long as his statements are "admitted as testimony against him *in a criminal case*." 538 U.S. at 767 (emphasis added). Given Petitioner's and the government's concession that the probable cause hearing at issue here was part of Officer Vogt's criminal case, this Court need go no further to affirm the Tenth Circuit's answer to the question presented.

B. The purpose and history of the Self-Incrimination Clause confirm its protections extend to the probable cause hearing here.

1. This Court has long described the Fifth Amendment privilege as the "essential mainstay" of the

"American system of criminal prosecution," which is "accusatorial, not inquisitorial." *Malloy v. Hogan*, 378 U.S. 1, 7-8 (1964). "The essence of this basic constitutional principle is the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Mitchell v. United States*, 526 U.S. 314, 326 (1999) (emphasis and quotation marks omitted). The interests served by this provision include "[ensuring] that self-incriminating statements will [not] be elicited by inhumane treatment and abuses," a "sense of fair play," and a "distrust of self-deprecatory statements." *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964). "'[A] system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses' than a system relying on independent investigation." *Withrow v. Williams*, 507 U.S. 680, 692 (1993) (quoting *Michigan v. Tucker*, 417 U.S. 433, 448 n.23 (1974)).

The courtroom use of compelled testimony to demonstrate guilt at any point in a criminal case is plainly an affront to these principles. In arguing instead that the sole purpose of the Fifth Amendment is to prevent use of such statements at trial and sentencing, Petitioner and the government discuss at length the circumstances in which this Court has permitted witnesses to invoke the privilege outside or prior to a criminal case. Pet. Br. 12-16; U.S. Br. 12-14. Petitioner's first argument on this point—that "compelling someone to speak" in situations where the privilege is available does not alone "violate the Fifth

Amendment," Pet. Br. 13—is a non-sequitur. Officer Vogt has not claimed that an out-of-court invocation of the privilege or the pre-prosecution compulsion of testimonial statements, without more, completes a Fifth Amendment violation. The question is whether the probable cause hearing at issue here is itself part of the future prosecution—i.e., part of "the criminal case"—that invocation of the privilege is designed to protect.

On the actual question presented in this case, Petitioner and the government argue that the Self-Incrimination Clause prohibits uses of compelled testimony only in proceedings that ultimately determine guilt and punishment because those are the only stages in the criminal case where the testimony is "incriminating." *See* Pet. Br. 16 & n.10; U.S. Br. 10-14. Petitioner and the government distinguish incriminating uses of a compelled statement from situations where use of the statement could at most expose the speaker to "embarrassment, 'personal disgrace or opprobrium,'" Pet. Br. 16 (quoting *Brown v. Walker*, 161 U.S. 591, 605 (1896)) (internal quotation marks omitted), or other non-criminal consequences, U.S. Br. 14.

Of course, Officer Vogt has never argued that his compelled statements merit Fifth Amendment protection merely because their use by the government might embarrass him or produce some other harm short of criminal consequences. His statements receive Fifth Amendment protection because they are indeed incriminating: they could be used, and in fact were used, as evidence of his guilt in a criminal case. The very cases quoted by the government establish that a compelled statement is "incriminating," and

therefore inadmissible in a criminal case, so long as "the witness reasonably believes [those statements] could be used in a criminal prosecution or could lead to other evidence that might be so used." *Hiibel*, 542 at 189. The Fifth Amendment turns on "the nature of the statement or admission and the exposure which it invites" at the time the statement is made. *In re Gault*, 387 U.S. 1, 49 (1967).

In other words, it is the *risk* of criminal prosecution as a result of a compelled statement, not actual use to determine guilt or punishment, that makes the statement incriminating. *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (a statement is incriminating when it "might *tend to* subject to criminal responsibility him who gives it" (emphasis added)); *Hoffman v. United States*, 341 U.S. 479, 486 (1951) ("The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime."). There is no sound basis for treating Officer Vogt's statements as non-incriminating; they went directly towards showing his guilt of the charged crime. *See* Pet. 14 (conceding the statements were incriminating).

Indeed, it is unclear why Petitioner and the government think it helps their cause to emphasize this Court's distinction between statements compelled when there is "no risk of future criminal liability" and situations where the use of "'the compelled testimony can ... lead to the infliction of criminal penalties.'" Pet. Br. 15, 17 (quoting *Kastigar*, 406 U.S at 461); *see* U.S. Br. 13 (the Fifth Amendment is concerned only

with "'testimony *leading to* the infliction of penalties affixed to the criminal acts'" (quoting *Ullmann v. United States*, 350 U.S. 422, 438-439 (1956) (emphasis added)). It may be that some pretrial uses of incriminating, compelled statements during a criminal case are so divorced from the ultimate determination of guilt and punishment as to warrant different treatment under the Fifth Amendment. *See* U.S. Br. 18 (proceedings to determine competency); Kansas Br. 5-8 (informal, nonadversarial hearings to determine probable cause for extending pretrial detention). But *the whole point* of the probable cause hearing against Officer Vogt was to determine whether there was sufficient evidence of his guilt for the prosecution to proceed. That probable cause hearing was a critical part of the criminal case against Officer Vogt and a necessary step the State had to take to continue prosecuting him, *see* Kan. Stat. § 22-2902(3)—a prosecution that was intended to culminate in a finding of criminal guilt and imposition of punishment against him. The government cannot seriously contend that the use of Officer Vogt's compelled statements to demonstrate the prosecution had sufficient evidence of his guilt to proceed to trial did "not expose [Officer Vogt] to the risk of conviction or punishment." U.S. Br. 11.

Disturbingly, by Petitioner's and the government's account, the prosecution could have forced Officer Vogt to take the stand to testify against himself at the probable cause hearing. The prosecution could have demanded he explain why he was guilty of the charged crime, and then the court could have relied on that explanation to allow the criminal case against Officer Vogt to proceed to trial. All of this would be fine, in their view, so long as the prosecution did not

then use the compelled statement again at Officer Vogt's trial or sentencing. Of course, as discussed further below, *infra* at 57-58, the prosecution would likely never face that conundrum given that the vast majority of defendants choose to enter a guilty plea rather than take the risk of going to trial.

It is hard to imagine a starker example than this of the prosecution "enlist[ing] the defendant as an instrument in his or her own condemnation." U.S. Br. 5, 12 (quoting *Mitchell*, 526 U.S. at 325). To allow the prosecutor to use compelled statements as evidence of guilt at this stage in a criminal case would result in precisely the "system of criminal law enforcement" this Court recognized in *Withrow* as antithetical to the Fifth Amendment: a system that "depend[s] on the 'confession'" rather than an "independent investigation." 507 U.S. at 692.

2. Historical practice confirms that the Framers intended the protections of the Fifth Amendment to apply to pretrial proceedings like Officer Vogt's probable cause hearing. Contrary to the government's argument that the Self-Incrimination Clause was a reaction only against using compelled testimony at trial, U.S. Br. 23, the Clause's origins reveal the Framers' intent to proscribe the examination of the accused under oath throughout the criminal case, including at pretrial proceedings to determine whether to bind over a defendant for trial.

Although the Fifth Amendment was designed to forestall attempts to return to the oath-based methods of criminal justice of the ecclesiastical and prerogative courts of the Star Chamber and High

Commission, John H. Langbein, *The Origins of Adversary Criminal Trial* 277-78 (2003); *see also Miranda v. Arizona*, 384 U.S. 436, 459-60 (1966), it also incorporated the self-incrimination privilege that developed in common law courts alongside these inquisitorial practices. 3 Joseph Story, *Commentaries on the Constitution* § 1782, at 660 (1833) (Fifth Amendment "is but an affirmance of a common law privilege"); Moglen, *supra*, at 1121; *Gecas*, 120 F.3d at 1454.

At common law, defendants had throughout the criminal process a right to refuse to provide self-incriminating testimony under oath. *See* Langbein, *supra*, at 278 ("At common law, the accused was not examined under oath."); Moglen, *supra*, at 1098-1100; Alschuler, *supra*, at 2650-51; *accord Doe*, 487 U.S. at 212. In fact, this freedom from questioning under oath—or under other forms of compulsion—was primarily a *pretrial* protection because defendants were not permitted to testify at trial, as a criminal defendant was thought to be inherently biased and therefore an unreliable witness. Langbein, *supra*, at 280; *see also Ferguson*, 365 U.S. at 574; Pet. App. 17a. In particular, the self-incrimination right played a central role in protecting defendants at the pretrial preliminary examination conducted by a justice of the peace. Alschuler, *supra*, at 2654-57; Moglen, *supra*, at 1098-99.

In that proceeding, a justice of the peace interrogated the accused felon and any witnesses about the charges brought by a citizen accuser in order to assist the "private prosecutor to build his case." Langbein, *supra*, at 43; *see also id* at 41-47; *see Gecas*, 120 F.3d

at 1452. Consistent with the common law privilege, however, the justice of the peace could not compel self-incriminating testimony—by oath, "physical force," or "threats of increased punishment"—and instead had to rely on the "force of argument" to obtain a voluntary confession. *See* Alschuler, *supra*, at 2650, 2653-54 & n.98, 2659; Moglen, *supra*, at 1098, 1103. Facing no compulsion, the defendant could decline to answer, and "doubtless would have suffered no more severe sanction than the drawing of an adverse inference." *See* Alschuler, *supra*, at 2653 & n.98.

As this history demonstrates, common law practice did not allow the use of the accused's compelled testimony at any point of the criminal case. Because the prosecution could not *compel* incriminating testimony from a defendant before or during the criminal case, the privilege guaranteed that compelled testimony could not be *used* at any point in the criminal case.

The government's contrary argument relies on academic discussions of cases where the justice of the peace accidentally put the defendant under oath and the court responded to the error by excluding the sworn evidence at trial. U.S. Br. 22; Langbein, *supra*, at 279-80; Alschuler, *supra*, at 2658-59. But the fact that the court excluded the evidence at trial does not establish, or even indicate, that the sworn testimony could be used elsewhere in the criminal process. Moreover, it is unsurprising the common law courts in these cases would focus on exclusion at trial, as opposed to any other use of compelled testimony. At that time, there were not the same opportunities for use of compelled testimony in pretrial proceedings, and so

the trial provided the primary proceeding where a defendant's statements might impermissibly be used. The pretrial preliminary examination that might produce compelled testimony would lead directly into a grand jury proceeding, which itself would take place "[a] day or so before trial." Langbein, *supra*, at 44-45.

Indeed, for at least some of the Framing-era history, the preliminary examination itself did not provide an opportunity for the use of a defendant's compelled statements. Through at least the eighteenth century, the justices of the peace did not adjudicate questions of guilt based on the testimony they uncovered from the accused at the preliminary hearing. Langbein, *supra*, at 44-45.[6] Justices of the peace could gather evidence but were "unable to resolve important matters in the pretrial" stage and in fact had "no power to dismiss felony charges for insufficiency of the evidence." Langbein, *supra*, at 44-47, 273-74; *see also Gecas*, 120 F.3d at 1442; *Conductor Generalis* 176. Because the justice of the peace could not evaluate these things, there would have been little reason for the government or prosecuting citizen to try to "use" a defendant's compelled statement.

But that does not mean that the use of such compelled testimony at a probable cause hearing would have been permissible had there been one. The historical development of the "modern privilege," U.S. Br.

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[6] The justice of the peace had authority to determine whether to authorize pretrial and pre-indictment release under bail, but that discretionary authority was limited, and in most cases the "Marian procedure presupposed the routine use of pretrial detention." Langbein, *supra*, at 48-49.

22-23, demonstrates the opposite. Toward the end of the eighteenth century and into the nineteenth century, preliminary examinations began to resemble something like the probable cause hearing at issue here. Magistrates would evaluate the sufficiency of the evidence and dismiss weak cases. Langbein, *supra*, at 45 n.177, 47 n.181, 273-277. As here, the preliminary hearing began to supplant some of the adjudicatory functions of the grand jury. *See* Langbein, *supra*, 45 n.177; *see id.* at 276 ("The magistrate's examination became the forerunner of the modern pretrial committal hearing."). Critically, and as the government admits, U.S. Br. 23, as these justices of the peace took on more of an adjudicatory role, they also provided additional protections to the defendants. For example, defendants had more freedom not to participate as witnesses (sworn or unsworn) at the preliminary hearing. Alschuler, *supra*, at 2660-61; Langbein, *supra*, at 276.

C. This Court's precedent confirms that the Self-Incrimination Clause applies to the probable cause hearing here.

Petitioner relies heavily on snippets of case law describing the Fifth Amendment as a "trial right." *See* Pet. Br. 9-15; *see also* U.S. Br. 16-19. Petitioner acknowledges that "[n]one of these statements ... was a holding on the precise question before the Court." Pet. Br. 9-10. Petitioner nonetheless goes on to overread those statements, violating its own admonition that "language in opinions must be viewed in the context of the case." Pet. Br. 24-25. Properly understood, those cases support only the notion that a Fifth

Amendment violation does not occur until the compelled statement is used in a criminal case. And Petitioner all but ignores this Court's cases recognizing that the prohibition on the use of compelled statements extends past trial to include sentencing and any use of the compelled statements that could lead to criminal penalties.

1. None of the cases quoted by Petitioner called upon the Court to consider the use of compelled testimony during criminal proceedings apart from a trial itself. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), provides a prime example. To determine when a Fourth Amendment violation occurs, the Court contrasted the Fourth Amendment with the Fifth Amendment, describing the privilege against self-incrimination as "a fundamental trial right of criminal defendants." *Id.* at 264. The Court added, "[a]lthough conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." *Id.* The Fourth Amendment's strictures, by contrast, apply "whether or not the evidence is sought to be used in a criminal trial, and a violation of the Amendment is fully accomplished at the time of an unreasonable governmental intrusion." *Id.* (internal quotation marks omitted).

Read in context, the term "trial right" in *Verdugo-Urquidez* was simply imprecise shorthand reflecting the distinction between Fourth Amendment violations, which are complete as soon as the government conducts an unreasonable search or seizure, and Fifth Amendment violations, which must be linked to a "criminal case." Had the Court's reference to "trial"

been changed to "criminal case," the reasoning and holding would have been the same.

It thus is unsurprising that several Justices have declined to rely on this language from *Verdugo-Urquidez* as a basis for concluding Fifth Amendment violations may occur only at trial. When the plurality in *Chavez* cited *Verdugo-Urquidez*, it was in support only of the proposition that the Fifth Amendment is not violated until the "use [of the compelled statement] in a criminal case." 538 U.S. at 767 (plurality opinion); *see also id.* at 792 (Kennedy, J., concurring in part and dissenting in part) (recognizing that "the extent of the right secured under the Self-Incrimination Clause was not ... before the Court" in *Verdugo-Urquidez*).

Petitioner's other cases use the "trial right" phraseology (and related formulations) to the same effect. In *Withrow*, 507 U.S. at 691-92, the Court again distinguished a Fourth Amendment violation, which is "completed" regardless of whether criminal charges are filed, from a Fifth Amendment violation, which the Court characterized a "trial right." And in *United States v. Patane*, 542 U.S. 630 (2004), the plurality described the Fifth Amendment as "primarily focuse[d] on the criminal trial" in explaining why the failure to give a *Miranda* warning does not by itself cause the Fifth Amendment to be violated. *Id.* at 637, 641-42. At no point did the plurality suggest a view on the implications of using compelled statements in a probable cause hearing.

Finally, Justice Marshall's dissent in *New York v. Quarles*, 467 U.S. 649, 686 (1984), likewise does not

implicate the question presented here. Justice Marshall's point was that the Fifth Amendment does not prohibit "emergency questioning" when the answers are never used in a criminal prosecution, even if that questioning does not adhere to the *Miranda* framework. He had no reason to consider whether the Fifth Amendment would be violated by use of the fruits of such questioning in a probable cause hearing. Indeed, it would be quite surprising if a dissent from the Court's decision to permit the use of an un-*Mirandized* statement at trial had been arguing that the Fifth Amendment's protections should apply *only* at trial.[7]

2. When directly confronted with questions about the scope of the Fifth Amendment's protections, this Court has repeatedly recognized the Fifth Amendment's protections are not limited to trial proceedings, squarely foreclosing Petitioner's theory that the dicta described above establish otherwise.

To begin with, this Court has twice held that the Self-Incrimination Clause applies to sentencing proceedings. *See Mitchell*, 526 U.S. at 327 (holding that Fifth Amendment's protection against compelled self-incrimination applies in "sentencing proceedings");

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[7] Petitioner stretches even further when it asserts that *Garrity* supports its position because the compelled statement at issue in that case was used at trial. Pet. Br. 25. Of course, the fact that the Fifth Amendment applies to trials says nothing about whether it also applies to a probable cause hearing. *Garrity* itself describes the Fifth Amendment as more broadly prohibiting the use of compelled statements "in subsequent criminal proceedings." 385 U.S. at 500.

Estelle v. Smith, 451 U.S. 454, 462-63 (1981) (compelled statements may not be used at the "penalty phase").[8] In reaching that conclusion, the Court recognized that the relevant question was whether those proceedings were part of the "criminal case." *Mitchell*, 526 U.S. at 327. The notion that the dicta in *Verdugo-Urquidez*, *Withrow*, and *Patane* establish the Clause applies only to trials is a non-starter for this reason alone.

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[8] The government highlights *Estelle*'s observation in dictum that if statements made in a psychiatric examination had been used only "for the limited, neutral purpose of determining his competency to stand trial," "no Fifth Amendment issue would have arisen." *Id.* at 465. That example bears no resemblance to the use of a compelled incriminating statement in a probable cause hearing as evidence that the defendant committed the charged crime. Indeed, the state-law pretrial mental examination statute at issue in *Estelle*, like its federal counterpart at the time, barred the use of findings from competency examinations "on the issue of guilt in any criminal proceeding." *Id.* at 463 n.6 (quoting Tex. Code Crim. Proc. Ann., Art. 46.02(g) (Vernon 1979)); 18 U.S.C. § 4244 (1976) (same).

The Federal Rules of Criminal Procedure likewise prohibit direct or derivative use of statements made by a defendant during a pretrial mental examination from being "admitted into evidence against the defendant in any criminal proceeding except on an issue regarding mental condition on which the defendant" has introduced certain types of evidence). Fed. R. Crim. P. 12.2(c)(4). As the Advisory Committee explained, under *Estelle*, "self-incrimination protections are not inevitably limited to the guilt phase of a trial," and "the privilege, when applicable, protects against use of defendant's statement and also the fruits thereof." *Id.* (1983 advisory committee's note).

The government responds to *Mitchell* and *Estelle* by adjusting its theory of the Fifth Amendment to encompass both the trial and sentencing phases of the criminal case, *see* U.S. Br. 5-6, 17-18; *see also* Pet. Br. 16 n.10, thereby proving Officer Vogt's point: *Verdugo-Urquidez*, *Withrow*, and *Patane* use the term "trial right" only as an imprecise reference to the Fifth Amendment's "criminal case" parameters, which Petitioner and the government concede include the probable cause hearing here. *See supra* at 18.[9]

Petitioner and the government also fail to meaningfully grapple with the Court's witness immunity cases, which confirm that pretrial uses of compelled testimony may violate the Fifth Amendment. In *Kastigar*, 406 U.S. at 449, the Court considered whether

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[9] Even if Petitioner were correct that this dicta establishes that a Fifth Amendment violation occurs only after use at trial, that would not end the inquiry. In other contexts, the Court has treated pretrial proceedings like Kansas's probable cause hearing as sufficiently trial-like to deserve protections reserved for trial. A defendant has a Sixth Amendment right to counsel at a trial-like probable cause hearing like the one here. *See Coleman v. Alabama*, 399 U.S. 1, 9 (1970); *Gerstein*, 420 U.S. at 122-23. The Court has also extended the Sixth and First Amendments' guarantee of a public trial to pretrial probable cause and suppression hearings. *See Press-Enterprise*, 478 U.S. at 12-13; *Waller v. Georgia*, 467 U.S. 39, 46-47 (1984). Although probable cause hearings "cannot result in the conviction of the accused," they are "sufficiently like a trial to justify" extending trial protections to them. *See Press-Enterprise*, 478 U.S. at 12. Indeed, proceedings like these are often the "only trial," *see Waller*, 467 U.S. at 46-47, and at the very least "the final and most important step in the criminal proceeding." *Press-Enterprise*, 478 U.S. at 12-13.

the federal immunity statute, which grants witnesses immunity from use and derivative use of their compelled testimony, provided a protection "coextensive with the scope of the [Fifth Amendment] privilege."[10] In explaining why the statute's protection is coextensive with the constitutional right, the Court left no doubt as to the right's breadth. When it offered examples of "possible incriminating uses of the compelled testimony," the Court did not confine itself to proceedings where ultimate guilt or punishment were at stake: prohibited uses can take place when "the prosecutor or other law enforcement officials may obtain leads, names of witnesses, or other information not otherwise available that might result in a prosecution." *Id.* at 459. In other words, prosecutors are barred from "using the compelled testimony in any respect" so as to "insure[] that the testimony cannot lead to the infliction of criminal penalties." *Id.* at 453; *see id.* at 460 (requiring a "total prohibition on use," including use of compelled testimony to obtain other evidence). In that way, the immunity conferred by the statute "leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege." *Id.* at 462.

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[10] The federal immunity statute provides that no compelled testimony "may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order" compelling the testimony. 18 U.S.C. § 6002. In other words, it sets forth an "explicit proscription of the use [of compelled testimony] in any criminal case." *Kastigar*, 406 U.S. at 453.

Petitioner concedes that *Kastigar* "could be read to say that the statutory grant of immunity would have direct application" outside of a criminal trial, Pet. Br. 17, but nonetheless maintains that *Kastigar*'s "context" shows that the Fifth Amendment's only concern is the use of such statements "at trial." Pet. Br. 17-18. As Petitioner and the government recognize (*id.*; U.S. Br. 11), however, *Kastigar* holds that the core purpose of the statute (and the Fifth Amendment) is to "assur[e] that the compelled testimony can in no way *lead to the infliction of criminal penalties.*" 406 U.S. at 461 (emphasis added).[11] Under that standard, the probable cause hearing here qualifies for the constitutional protection: the whole point of the hearing was to determine whether there was sufficient evidence of Officer Vogt's guilt to move forward with criminally prosecuting him.

That a grant of immunity has application outside of trial is confirmed by the Court's application of *Kastigar* in *Hubbell*, 530 U.S. at 30. The Court made clear that the government violates the prohibition on "use" of immunized testimony when it makes a pretrial derivative use of a witness's compelled testimony to

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[11] Petitioner is also wrong to suggest (Pet. Br. 18) that an earlier immunity case, *Murphy v. Waterfront Commission of N.Y. Harbor*, 378 U.S. 52, supports its "trial right" limitation. In stating that the Fifth Amendment prohibits the use of compelled statements "in a criminal trial," *id.* at 57 n.6, the Court did not hold that a trial was the *only* proceeding in which a violation could occur. Instead, the Court noted that the privilege protects state witnesses "against federal *prosecution*," such that a constitutionally valid immunity rule must preclude use of a state witness's compelled testimony "in connection with a [federal] criminal *prosecution* against him." *Id.* at 79 (emphasis added).

"prepare criminal charges against him." The Court required the dismissal of an indictment that had been obtained using "the testimonial aspect" of the witness's "act of producing subpoenaed documents." *Id.* at 42. Even though the government intended no use of that "testimonial aspect" at trial, dismissal was required because the government had "already made" a prohibited derivative use of the compelled evidence "in obtaining the indictment." *Id.* at 41. That use, in turn, supplied "the first step in a chain of evidence that led to [the] prosecution." *Id.* at 42. Because the government could not prove "that the evidence it used in obtaining the indictment and proposed to use at trial" came from independent sources, it could not save the indictment from dismissal. *Id.* at 45. That disposition, the Court explained, was required by the immunity statute and the "constitutional privilege" it embodies. *See id.* at 46.

The government entirely ignores *Hubbell*, and Petitioner's attempt to distinguish it makes no sense. Petitioner admits that the Court dismissed an indictment obtained through the prosecution's derivative use of compelled testimony in contravention of the immunity statute, but nonetheless suggests the Court's holding turned on the notion that the government "proposed to use" the tainted evidence at trial. Pet. Br. 18 n.11. But that proposed trial use does not change the fact that the government had *already* violated the immunity statute by making use of the compelled testimony to obtain the indictment. *See* 530 U.S. at 41, 45. And it is hard to understand why "proposed" use at trial (i.e., not actual use at trial) means that "the Court had no occasion to determine whether the Fifth

Amendment is actually violated by uses short of trial." Pet. Br. 18 n.11.

In short, there is simply no way to read *Kastigar* and *Hubbell*—and the broad protections they articulate against any use that may "lead" to criminal penalties—as conditioning Fifth Amendment violations on use in a proceeding that ultimately assesses guilt or punishment. Using a witness's compelled statement to obtain an indictment, *see Hubbell*, 530 U.S. at 45-46, or to establish probable cause to maintain a prosecution, exposes that witness to the risk of criminal punishment. Such pretrial uses of compelled testimony therefore go to the core of the Fifth Amendment's concern.

Finally, although the Court did not reach a majority opinion in *Chavez v. Martinez*, each of the separate opinions in that case undermines Petitioner's "trial right" theory. The issue in *Chavez* was whether police officers' use of severe compulsion to obtain incriminating statements violated the Fifth Amendment even though no criminal charges were ever filed against the declarant. *See* 538 U.S. at 764 (plurality opinion). In addressing this question, Justice Thomas, writing for a plurality, recognized that the operative term for identifying the parameters of the Fifth Amendment is "criminal case," explaining "it is not until [the] use [of compelled statements] in a criminal *case* that a violation of the Self-Incrimination Clause occurs." *Id.* at 767 (emphasis added). Other Justices likewise declined to treat the criminal *trial* as the touchstone of a Fifth Amendment violation. *See id.* at 777 (Souter, J., concurring in the judgment) ("the text of the Fifth Amendment ... focuses on *courtroom use*

of a criminal defendant's compelled, self-incriminating testimony" (emphasis added)); *id.* at 789 (Kennedy, J., concurring in part and dissenting in part) (describing Justices Thomas' and Souter's opinions as "conclud[ing] that a violation of the Self-Incrimination Clause does not arise until a privileged statement is introduced at some later criminal *proceeding*" (emphasis added)).

Each of those formulations is consistent with the Tenth Circuit's holding. Each reflects an interpretation of the Fifth Amendment's reference to a "criminal case" that belies Petitioner's suggestion that that term is irrelevant to the question presented here. And each contradicts Petitioner's notion that use of a witness's compelled statements at in-court adversarial proceedings that are part of a criminal case cannot constitute a Fifth Amendment violation.

Petitioner suggests that *Chavez* forecloses the possibility that "a Fifth Amendment violation can occur absent *any* courtroom use of the resulting statements," Pet. Br. 18, but that provides Petitioner no help here: Officer Vogt's probable cause hearing was indisputably an adversarial courtroom proceeding. Unlike in *Chavez*, where there was no such use (because there was no criminal case), the question presented here is whether the use of a defendant's compelled statement in the courtroom as evidence of his criminal guilt violates the Fifth Amendment. The constitutional text, purpose, and history, as well as this Court's precedent, answer yes.

D. Petitioner's arguments about grand jury proceedings do not support excluding from the Fifth Amendment's protections an in-court, adversarial probable cause hearing following the initiation of criminal charges against the defendant.

Unable to support its "trial right" limitation with constitutional text, precedent, or purpose, Petitioner changes the subject to grand juries. But this case does not involve grand jury proceedings, and as the government correctly notes (U.S. Br. 9 n.3), the Court need not consider the Clause's application in that context to affirm the decision below. In any event, Petitioner's concerns are wide of the mark.

Petitioner first asserts that extending the Self-Incrimination Clause's protections to a probable cause hearing "cannot be squared" with the protections this Court has extended to facially valid indictments issued by grand juries. Pet. Br. 19-20. Even accepting the premise that facially valid indictments generally cannot be challenged as founded on compelled testimony, *see* Pet. Br. 19, it does not follow that the Fifth Amendment protects uses of compelled testimony "only at trial." At most, that doctrine would shield pre-indictment uses of compelled statements from Fifth Amendment scrutiny. The absence of a "criminal prosecution" at the time the grand jury does its work explains why "certain constitutional protections," including some aspects of the Self-Incrimination Clause, "have no application before that body." *Williams*, 504 U.S. at 49. Indeed, a grand jury may

consider evidence without having "identif[ied] the offender it suspects, or even 'the precise nature of the offense' it is investigating." *Id.* at 48.

Further, given the grand jury's unique role and history, any special rule that eases the Fifth Amendment's constraints in grand jury proceedings need not apply identically to pretrial proceedings that take place in court after criminal charges are filed. "The grand jury's sources of information are widely drawn," *United States v. Calandra*, 414 U.S. 338, 344 (1974), and "the whole history of the grand jury institution" is one "in which laymen conduct their inquiries unfettered by technical rules," *Costello v. United States*, 350 U.S. 359, 364 (1956). It is against this backdrop that the Court has indicated "an indictment valid on its face" generally may not be challenged "on the ground that the grand jury acted on the basis of inadequate or incompetent evidence." *Calandra*, 414 U.S. at 345. That backdrop, of course, is not common to all pretrial proceedings.

Petitioner contends that the same Fifth Amendment analysis must apply to grand jury proceedings and probable cause hearings because the latter type of hearing is not constitutionally required, and instead serves as an "alternative" to grand jury proceedings. Pet. Br. 21. But States are not excused from adherence to constitutional protections just because they adopt criminal procedures beyond the constitutional minimum. To take one example, "[t]he Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions," yet whatever appellate procedures a State chooses to pro-

vide must nonetheless comply with due process. *Halbert v. Michigan*, 545 U.S. 605, 610 (2005). And "in first appeals as of right, States must appoint counsel to represent indigent defendants." *See id.*

That same principle applies when States provide pretrial proceedings that are not themselves constitutionally mandated. Defendants in those proceedings still have constitutional rights that must be respected. *See* Wayne R. LaFave et al., *Criminal Procedure*, § 14.2(a) (4th ed. 2017) ("Though the constitution does not require that the defendant be afforded a preliminary hearing, once a jurisdiction provides for a preliminary hearing, it may not then restrict the defendant's right to that hearing in a manner that would violate constitutional protections." (citing, *e.g.*, *Coleman v. Alabama*, 399 U.S. 1 (1970)). Accordingly, a State's decision to incorporate probable cause proceedings into its criminal procedures does not excuse those proceedings from compliance with a defendant's Fifth Amendment rights.

II. Petitioner's Policy Concerns Do Not Justify Limiting The Fifth Amendment's Protections.

Petitioner and the government assert a variety of policy concerns about the purported consequences of the Tenth Circuit's holding for law enforcement procedures. Of course, this Court interprets the Constitution according to its meaning, not whether States or

the federal government will have to alter their practices as a result. In any event, Petitioner's and the government's asserted policy concerns are inapt.[12]

A. The Fifth Amendment accommodates governmental interests.

1. Petitioner urges the Court to read the Fifth Amendment narrowly because governments have a "vital and compelling interest in rooting out misconduct and discharging those who betray the public trust." Pet. Br. 26. But applying the Fifth Amendment to proceedings like Officer Vogt's probable cause hearing would not undermine that interest. There is no disagreement that Petitioner had authority to compel the information it wanted from Officer Vogt and that it could have relied on those compelled statements to discharge him. The question is whether the statement could later be used as evidence of Office Vogt's guilt at the probable cause hearing. Answering that question in the negative would not render Petitioner helpless to root out wrongdoing. To the contrary,

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[12] Petitioner's amici raise a handful of policy arguments that are outside the scope of the question presented. This case concerns the meaning of the Fifth Amendment; the Tenth Circuit did not consider the alternative § 1983 arguments advanced by the State and Local Government Employers, nor has Petitioner raised them. As we have explained, *supra* at 45-47. and as the government agrees, *see* U.S. Br. 9 n.3, this case does not require the Court to consider uses of compelled testimony in grand jury proceedings. And whatever rule the Court adopts in this case need not extend to *Gerstein* hearings, which serve a different purpose (determining probable cause to continue pretrial detention), do not require appointment of counsel, and must generally take place within 48 hours of arrest. *See* Kansas Br. 5-8.

government entities like Petitioner can and will continue to compel "information to 'assure the effective functioning of government.'" *Turley*, 414 U.S. at 81 (quoting *Murphy*, 378 U.S. at 93 (White, J., concurring)). The only "caution" Petitioner must heed, Pet. Br. 29, was put in place by this Court long ago: government employers cannot use compelled statements to trigger prosecution of a criminal case against the speaker.

In any event, the government's interest in rooting out wrongdoing is no reason to diminish the Fifth Amendment's protections. Even if a faithful application of the Fifth Amendment "adds to the burden of diligence and efficiency resting on enforcement authorities," this Court has not let that concern "seriously compromise an important constitutional liberty." *Hoffman*, 341 U.S. at 489-90. The imperative to safeguard individuals from compelled self-incrimination "transcend[s] any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime." *United States v. White*, 322 U.S. 694, 698 (1944).

2. In the years since this Court first determined that a government employer may not in subsequent "criminal proceedings" make use of statements that it "coerce[s]" from an employee "under threat of removal from office," *see Garrity*, 385 U.S. at 500, law enforcement agencies around the country have developed effective means of accommodating law enforcement interests and the Fifth Amendment. In one "best practices" guide designed for smaller police departments, for example, officers are advised that *Garrity* requires that they "immediately cease [their] administrative

inquiry and have someone else begin a criminal investigation" when a routine administrative investigation suggests possible criminal wrongdoing. Beau Thurnauer, *Internal Affairs: A Strategy for Smaller Departments*, Int'l Assoc. of Chiefs of Police 3-4 (undated), https://tinyurl.com/ybfdn57t. And none of the information obtained "can be shared with the criminal investigator." *See id.* at 4. Other departments elect to run completely separate criminal and administrative investigations or to have the administrative investigation follow the criminal investigation. *Id.* at 3.

The U.S. Department of Justice employs similar procedures when it investigates police officers for criminal wrongdoing following an internal affairs investigation by the local department. In order to comply with the protections given to statements generated during the internal investigation, the Department of Justice's review of internal affairs material will involve "personnel who are not involved in the investigation or prosecution ... redact[ing] privileged testimony before either the grand jury or the prosecuting attorneys see the statement." *In re Grand Jury Subpoena (Huntington Beach Police Officers Assoc.)*, 75 F.3d 446, 448 (9th Cir. 1996); *see also In re Grand Jury (John Doe)*, 478 F.3d 581, 583 (4th Cir. 2007); *In re Grand Jury Subpoena (Stover)*, 40 F.3d 1096, 1103 (10th Cir. 1994). And those investigating civil rights violations are directed not to review internal affairs statements but to instead forward them to the FBI in a sealed envelope so that any compelled statements can be removed before the materials are reviewed by the Department of Justice. U.S. Dep't of

Justice, *Civil Rights Resource Manual* No. 45 (3d ed. 2016).[13]

Had Petitioner followed well-known and established practices like these, it would have been free to investigate wrongdoing (and even precipitate criminal charges) without exposure to civil liability. Indeed, without much effort, a police department can also eliminate any confusion about whether its questioning of an employee serves an administrative or criminal purpose. When a government employer wants to elicit a statement that is free of the constraints of immunity, it can inform the person it is investigating that they are free not to answer the question. *E.g.*, Memorandum from Christopher A. Wray, Assistant Attorney General, to All Federal Prosecutors 2 (May 6, 2005) (describing *Garrity* warning), https://tinyurl.com/yb6c9fg2; *see also* Thurnauer, *supra*, at 3. That removes the compulsion while preserving the target's self-incrimination rights. *See, e.g.*, *United States v. Palmquist*, 712 F.3d 640, 644, 647 (1st Cir. 2013). If the government employer simply wants the information for an internal affairs investigation, it can provide expressly the immunity that *Garrity* requires. *See Kalkines v. United States*, 473 F.2d 1391, 1394 (Ct. Cl. 1973); *see also* Wray, *supra*, at 2-3.

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[13] Federal prosecutors maintain similar practices and are instructed to secure immunized testimony. U.S. Dep't of Justice, *Criminal Resource Manual* § 726. Moreover, the federal government will not authorize a prosecution when immunity has been given without first assuring itself that it can meet its burden under *Kastigar*. U.S. Dep't of Justice, *U.S. Attorney's Manual* §§ 9-23.210, 9-23.400.

So it is plain that uncertainty—about the quality of the evidence, whether it was compelled, or what prosecutors could do with that evidence—is not what leads a government employer like Petitioner to cause a Fifth Amendment violation. Instead, it is an alarming unwillingness to respect what the Fifth Amendment requires when governmental entities investigate their employees. The facts of this case are illustrative. The complaint allows no uncertainty about whether Officer Vogt's statements were compelled. Those statements were uttered in an internal affairs investigation where Officer Vogt was required to answer. Nonetheless, Petitioner made the deliberate and voluntary choice to inject those internal affairs statements and their fruits into the criminal process by passing them along to criminal investigators. Pet. App. 49a, 50a. At that moment, Petitioner exposed itself to the risk of a Fifth Amendment violation because, as even Petitioner admits, its actions triggered the distinct possibility that the statements would be used against Officer Vogt "at trial." Pet. Br. 27.

3. In practice, Petitioner's rule would hinder state and federal investigatory efforts because it would upset the well-settled expectations underlying the Fifth Amendment immunity doctrines that have "become part of our constitutional fabric." *Kastigar*, 406 U.S. at 447 (quoting *Ullmann*, 350 U.S. at 438).

If this Court were to rule for Petitioner, it would necessarily mean that "use and derivative use" immunity protects a defendant only at trial (and perhaps sentencing). But an immunity so limited is not particularly valuable to someone facing government

questioning and possible prosecution. If the choice is between losing one's job and giving compelled testimony that can be used to prosecute a criminal case against you all the way up until trial, the choice for many will be clear. And the incentive to be fully truthful after a grant of immunity drops precipitously if the individual retains such a significant prospect of criminal exposure. If the Fifth Amendment's protections exclude important pretrial proceedings like probable cause hearings, that would upset the "rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify." *Kastigar*, 406 U.S. at 446.

B. Courts can accommodate the Fifth Amendment.

Both Petitioner and the government argue that accepting the Tenth Circuit's rule would create difficulties for the courts (and prosecutors) because courts will not have an opportunity to weigh in on uncertain questions of compulsion before the prosecutors can decide whether to use those statements at a probable cause hearing. Pet. Br. 28-29; U.S. Br. 26-32. Petitioner argues that upholding the Tenth Circuit's decision would require adjustments of existing procedures and inhibit prosecutors from using arguably compelled testimony at the probable cause hearing. Pet. Br. 28-29; U.S. Br. 29 ("adjudication of suppression issues would thus fundamentally alter the nature of pretrial proceedings").

As the certiorari petition acknowledges (Pet. 7), however, application of the Fifth Amendment at pretrial hearings is the law of the land in at least four

circuits (Second, Seventh, Ninth, and Tenth), and there has been no sign that those proceedings have become unworkable for prosecutors in those parts of the country. But even if some jurisdictions' procedures would need modification to accommodate the Fifth Amendment's proper scope, that consequence would be unremarkable. The same was true when the Court determined in *Jackson v. Denno*, 378 U.S. 368 (1964), that a New York court could not present the issue of voluntariness of a confession to the jury, and the issue would instead have to be considered by the court in a pretrial hearing. *Id.* at 394. Similar adjustments were undertaken when this Court required Fourth Amendment probable cause determinations before a judicial officer "promptly after arrest." *Gerstein*, 420 U.S. at 125; *cf. Melendez-Diaz*, 557 U.S. at 325 ("The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience."). If current practice is out of sync with what the Constitution requires, the remedy is to change current practice.

That is not to say that every jurisdiction must follow a one-size-fits-all solution. "In some States, existing procedures may satisfy the [Fifth Amendment] requirement"; "[o]thers may require only minor adjustment." *Gerstein*, 420 U.S. at 124. But even though "[t]here is no single preferred pretrial procedure," *id.* at 123, it is essential that Fifth Amendment rights be respected throughout the criminal process.

In any event, Kansas itself provides an example of how state procedures can respect the Fifth Amendment right. Probable cause hearings in Kansas already allow for robust adversarial procedures. Kan. Stat. § 22-2902(3). Issues of suppression may be resolved at or before the hearing. *Id.* § 22-3215(6). In fact, some questions of admissibility *must* be answered at the hearing. *E.g.*, *id.* § 22-2902c ("court may admit into evidence an alleged controlled substance" when prosecution shows it has met certain criteria). If the only issue is that the hearings often take place promptly after charges are filed, that timing can be relaxed when "good cause" requires. *Id.* § 22-2902(2); *accord* Fed. R. Crim. P. 5.1(d) (a "magistrate judge may extend the time limits" with "defendant's consent and upon a showing of good cause"). Such a delay may be warranted if the entire prosecution turns on the ability to use the potentially compelled evidence. All of this is to say that existing procedures appear to already permit prompt pretrial resolution of Fifth Amendment questions.[14]

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[14] The government mischaracterizes Officer Vogt's argument as maintaining that any and every pretrial reference to compelled testimony in a criminal case violates the Fifth Amendment. *See* U.S. Br. 31-32. It is not Officer Vogt's position that a suppression hearing to filter out compelled statements would itself violate the Clause. That argument is circular since the point of a suppression hearing is to determine whether the statement is compelled and eligible for Fifth Amendment protection in the first place. Insofar as the statement is "used" during a suppression hearing, a judicial determination of whether the statement in question is "compelled" for Fifth Amendment purposes is not a use "against" a defendant.

Moreover, many courts have already determined the Fifth Amendment requires pretrial proceedings in cases where testimony has been immunized. Once someone shows he provided immunized statements, the government has "the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." *Kastigar*, 406 U.S. at 461-62; *Hubbell*, 530 U.S. at 45. That inquiry admits an equally time-consuming procedure, yet courts routinely hold so-called "*Kastigar* hearings" and a "pre-trial hearing is the most common choice." *United States v. North*, 910 F.2d 843, 854 (D.C. Cir.), *modified on reh'g*, 920 F.2d 940, 942 (D.C. Cir. 1990); *Stover*, 40 F.3d at 1104 (officer compelled "to provide an internal affairs statement" is entitled to "*Kastigar-style* hearing"). If courts are already being called upon to assess the effect of immunized testimony before trial, upholding the Tenth Circuit's rule will likely have little additional marginal effect.

In cases where continued prosecution depends on whether testimony is compelled, it benefits all involved to make that determination early in the case. That will best serve the preliminary hearing's important purpose: to "avoid both for the defendant and the public the expense of a public trial" and "to ... [ensure that] there are substantial grounds upon which a prosecution may be based." LaFave, *supra*, § 14.1(a) (quotation marks omitted; alterations in original).

C. Other constitutional protections are inadequate to safeguard defendants.

Even if the rules urged by Petitioner and the government would make things easier for prosecutors

and the courts, that regime would fail to offer criminal defendants adequate protections.

1. Petitioner's fallback remedy for improper use of compelled testimony at probable cause hearings—"exclusion of evidence at trial"—rings hollow for many defendants. Pet. Br. 30. The primary reason for the probable cause hearing is to give the defendant a chance to *avoid* trial. The prosecution's use of compelled statements at that proceeding deprives the defendant of Kansas's guarantee that he will not have to face trial unless the government has enough evidence.

Even if the probable cause hearing does not definitively establish guilt, it still comes with significant repercussions for the defendant. At the very least, accepting Petitioner's rule means that some defendants will face the risk of a trial and conviction in cases that never should have gotten past the probable cause hearing.

An unnecessary trial is daunting enough. But Petitioner's position also "ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). Just as with the Sixth Amendment right at issue in *Lafler*, the Self-Incrimination Clause "cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences." *Id.*; *see also Mitchell*, 526 U.S. at 325.

Given the ubiquity of plea bargaining, the probable cause hearing is for many defendants their only

real chance to challenge the basis for the charges against him. That hearing is "often the final and most important step in the criminal proceeding." *Press-Enterprise*, 478 U.S. at 12. If a defendant loses, the outcome is often a plea. *See id.* If this Court were to accept Petitioner's rule, defendants whose compelled statements are immunized will still have to choose between trial and a plea even though the prosecution should never have been entitled to go to trial in the first place.

At a minimum, exclusion of evidence at trial creates no "disincentive against governmental overreach." Pet. Br. 30. If anything, the opposite is true. Take, for example, a borderline case in which the prosecutor knows a defendant's compelled statements would not be admissible at trial. The prosecution may nonetheless be tempted to bring the case in the hope that it can extract a plea. If this Court determines that prosecutors can get past the preliminary hearing by relying on testimony that could never come in at trial, prosecutors will be all the more emboldened to bring questionable cases, and defendants will have no effective way to test the case against them at the preliminary hearing. Petitioner's rule does not allow defendants recourse under the Fifth Amendment but instead requires them to depend only "upon the integrity and good faith of the prosecuting authorities." *Kastigar*, 406 U.S. at 460.

2. Finally, Petitioner's reference to protections under the Fourth, Eighth, and Fourteenth Amendments misses the point. Officer Vogt is not complaining about the "misconduct that occurs in connection with an interrogation." Pet. Br. 30. Officer Vogt has

sufficiently alleged a violation of the Fifth Amendment based on the use of compelled statements, not the manner by which those statements were extracted. To be sure, some of the protections Petitioner identifies may prevent prosecutors from ever obtaining the evidence in the first place. But, assuming some forms of compulsion are consistent with the Fifth Amendment, *see Turley*, 414 U.S. at 78; *Kastigar*, 406 U.S. at 453; *Chavez*, 538 U.S. at 773, the Fifth Amendment protections against the use of such statements are still independently vital and necessary.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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